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ALEXANDER

No. 81-114

In the Supreme Court of the United States

OCTOBER TERM, 1980

SAVARE DEFELICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the construction of a dam and causeway in tidal waters of a canal connected to the Gulf of Mexico is subject to the prohibitions and requirements of Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, and of Sections 301(a) and 404 of the Clean Water Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 641 F. 2d 1169. The opinion of the district court (Pet. App. B1-B12) is unofficially reported at 14 E.R.C. 1122.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1981. The petition for a writ of certiorari was filed on July 20, 1981, as of July 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. Pertinent portions of Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 and 403, are set out in the opinion of the court of appeals (Pet. App. A7-A8 n.4).

2. Sections 301(a) and 404(a) of the Clean Water Act,[1] 33 U.S.C. 1311(a) and 1344(a), are also quoted in the opinion of the court of appeals (Pet. App. A8 n.5).

STATEMENT

1. In 1944 DeFelice Land Corporation purchased a parcel of land from Citrus Lands of Louisiana. DeFelice Land also acquired a right of access to the parcel through property retained by Citrus Lands.[2] This right of access led to a causeway over a dam in the Cheniere Traverse Canal.[3] In 1959, the land retained by Citrus Lands was sold. The new owner blocked the access route by erecting a gate. By 1966 the dam had been completely destroyed, and the waters of the canal formed a continuous passage for boats (Pet. App. A5-A6, B3-B4).

In 1974, DeFelice Land Corporation filed suit in state court seeking confirmation of its right of access across the land formerly held by Citrus Lands. In 1976, the Fourth Circuit Court of Appeals of Louisiana sustained DeFelice

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[1]This statute is also referred to as the Federal Water Pollution Control Act, a reference used by the courts below. See Section 518 of the Act, as amended by Section 2 of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. (Supp. III) 1251 note.

[2]DeFelice Land Corporation is not a party in this case; petitioner's relationship to the corporation is not clear. While the petition for certiorari (and petitioner's filings in the courts below) assert that the land was acquired by "the DeFelice family" in 1944 (Pet. 2) and repeatedly identifies the land as "petitioner's property" (Pet. 9) or "his property" (Pet. 14), paragraph 6(b) of the pretrial order in this case recites that it was the corporation that acquired the property in 1944. Petitioner also claims that his right of access through the lands retained by Citrus Lands was sustained in *DeFelice Land Corp.* v. *Citrus Lands of Louisiana, Inc.*, 330 So.2d 631 (La. Ct. App. 1976) (Pet. App. C1-C11). The corporation was the sole plaintiff in that case.

[3]The record does not indicate when the dam was built or by whom. Maps prepared in 1903 indicate the existence of the canal and the dam (Pet. App. A6 n.1).

Land's right of access through the property and remanded for determination of the precise location of the easement. *DeFelice Land Corp.* v. *Citrus Lands of Louisiana, Inc.*, 330 So.2d 631 (Pet. App. C1-C11).

2. In July 1977, petitioner began placing sand and fill material at a point in the Cheniere Traverse Canal near Myrtle Creek in Plaquemines Parish, Louisiana (Pet. App. A6 & n.2) with the professed intent of replacing the dam and causeway that had been located there (Pet. 4-5; Pet. App. A6-A7, B4). Petitioner intended to use the completed dam and causeway as part of the access way leading to the land acquired by the DeFelice Land Corporation (Pet. App. B3). By July 19, 1977, petitioner had completely blocked this 40-foot wide canal with fill that reached the levels of both opposite banks (Pet. App. A7 n.3). The fill obstructed navigation by operators of 28- to 30-foot shrimping vessels (Pet. App. A15-A16) to and from other canals that connected the Cheniere Traverse Canal with the Gulf of Mexico.[4]

Investigators from the Army Corps of Engineers' New Orleans District observed petitioner's activities and caused a cease and desist order to be mailed to him by certified mail (Pet. 5; Pet. App. A7-A8). After petitioner and his attorney disputed the Corps' regulatory jurisdiction, this civil action was commenced in July 1978 on behalf of the United States in the United States District Court for the Eastern District of Louisiana. The government sought an order requiring petitioner to restore the canal to its original condition and

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[4]No evidence shows that the canal was privately owned by petitioner, his family, or anyone else (Pet. App. A14 n.10; see also Pet. 8). Petitioner stipulated that the waters of the canal ebb and flow with the tide (Pet. App. A15, B5), and he later conceded that his activities were subject to the Clean Water Act (Pet. App. A10 n.9, B4-B5). Petitioner never sought a permit from the Army Corps of Engineers to authorize filling the canal or building any dam or causeway.

prohibiting him from constructing any improvements in the canal or from discharging fill into it without first obtaining a Corps permit.[5]

3. The district court held (Pet. App. B5) that the canal was a navigable waterway within the scope of the Rivers and Harbors Appropriation Act, and rejected petitioner's contention that the state court judgment in *DeFelice Land Corp.* v. *Citrus Lands, supra* (Pet. App. C1-C11), created a right to construct a dam in the canal without compliance with federal requirements. In the court's view, the "state court judgment granting a right of access does not conflict with the federal requirement of a permit" (Pet. App. B10). The district court further found that the material that petitioner placed in the canal constituted a forbidden "dam" and "obstruction" within the meaning of Sections 9 and 10 of the Rivers and Harbors Appropriation Act (33 U.S.C. 401 and 403), and therefore required a permit from the Corps of Engineers (Pet. App. B6-B7). In addition, the district court concluded that a "dredge-and-fill" permit from the Corps was required under Section 404 of the Clean Water Act (33 U.S.C. (Supp. III) 1344) before petitioner could lawfully deposit sand and other material into the canal (Pet. App. B9-B10).[6] The district court directed

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[5]Petitioner counterclaimed charging that the action of the Corps of Engineers deprived him of property without due process and without just compensation, in violation of the Fifth, Ninth, Tenth, and Fourteenth Amendments. Petitioner asserted that the action of the Corps interfered with access to "his" property, resulted in depreciation of the property of $100,000, and clouded "his title." Although petitioner's counterclaim relied on the judgment in *DeFelice Land Corp.* v. *Citrus Lands, supra* (Pet. App. C1-C11), it failed to indicate what interest petitioner has in the property. See note 2, *supra*. See generally *United States* v. *Dow*, 357 U.S. 17, 20-21 (1958). The district court severed the counterclaim, and it is still pending (Pet. App. A9 n.7).

[6]As mentioned previously (*supra*, note 2), petitioner conceded that the canal was subject to the requirements of the Clean Water Act (Pet. App. B4-B5).

petitioner to remove material already in the canal and not place more into it.[7]

The Fifth Circuit affirmed in all respects.[8] The court of appeals quoted with approval (Pet. App. A12-A15) the Corps' regulations indicating that a "canal or other artificial waterbody that is subject to ebb and flow of the tide" is a "navigable water of the United States" (33 C.F.R. 329.8(a)(1)), and that "private ownership"—which has not been established in this case—of the "lands underlying the waterbody * * * does not preclude" navigability (33 C.F.R. 329.8(a)(3)). The court of appeals rejected petitioner's contention that navigability required a two-step test of "navigability in fact" and "connection with a continuous waterway system" (Pet. App. A14), explaining (Pet. App. A17-A18; footnote omitted; emphasis in original) that:

> DeFelice has apparently confused the requirements of "navigable waters of the United States" for tidal coastal waters, with the requirements for non-tidal inland waters. We make this assumption because of the cases which DeFelice relies on in support of this proposition. These cases are inapplicable because they deal with *landlocked, non-tidal* water bodies where the Courts have generally required a connection with other interstate waterways unless the waterway is in fact navigated regularly by vessels in commerce. As previously

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[7]The district court refused to assess a civil penalty against petitioner, although Section 309(d) of the Clean Water Act, 33 U.S.C. (Supp. III) 1319(d), authorizes such assessments up to $10,000 for each day of violation (Pet. App. B11).

[8]In the court of appeals, petitioner claimed that he was excused by the Corps regulations themselves from obtaining a Corps permit, because he was replacing a "currently serviceable" dam within the scope of the exemption established in 33 C.F.R. 322.4(c). The court of appeals agreed with the Corps' interpretation that a "currently serviceable" dam could not mean a dam that had ceased to exist in 1966 (Pet. App. A19-A21). Only in 1974 were steps begun in state court to confirm and locate the access way across the canal.

> established, Cheniere Traverse Canal is *not* landlocked, and is tidal. Tidal waters by their very nature form a continuous water body with interstate waterways.

But even assuming the correctness of petitioner's two-step test, the Fifth Circuit concluded that the result in this case would be the same because (Pet. App. A15-A16; footnote omitted):

> the record does conclusively demonstrate that Cheniere Traverse Canal is (i) tidal—a fact stipulated to by both parties, (ii) navigable in fact—has in the past, does presently or is capable of supporting transportation in interstate or foreign commerce, and (iii) connected with a continuous interstate waterway. Several witnesses who had leased campsites along the canal beginning in the early 1960's testified that their 28-30 foot Lafayette Skiff type shrimping vessels were too large to safely maneuver in other near-by water routes except in the connecting canals of Cheniere Traverse, Timbers and Wilkinson.

Finally, the court noted (Pet. App. A18):

> Requiring tidal water bodies to meet the test for non-tidal, navigable in fact water bodies (which coincidentally they do here anyway) is really to eliminate the ebb and flow test. The law is to the contrary because even shallow tidal areas, like sloughs or marshes below the elevation of a mean high water line, are subject to regulation under the 1899 [Rivers and Harbors Appropriation Act] * * *.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. Petitioner insists that he is somehow excused from obtaining necessary Corps of Engineers permits allowing

him to build or rebuild a dam in waters of a canal admittedly tidal and connected to the Gulf of Mexico, and navigable in fact. Sections 9 and 10 of the Rivers and Harbors Appropriation Act (33 U.S.C. 401 and 403) and Section 404 of the Clean Water Act (33 U.S.C. (Supp. III) 1344) plainly require such permits, as do applicable Corps regulations (33 C.F.R. Parts 320 *et seq.*). As grounds for this assertion, petitioner now claims that, because this manmade canal became navigable only after the "[w]rongful removal" of the dam by unknown persons in 1966 (Pet. 8), the canal is beyond the regulatory reach of the Rivers and Harbors Appropriation Act. He relies on *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), and *Vaughn* v. *Vermilion Corp.*, 444 U.S. 206 (1979).

Kaiser Aetna is authority to the contrary. There, a private, landlocked Hawaiian "fish pond" was artificially opened to the ocean, without Corps objection, by deepening connecting channels to enable boat passage. No party challenged that these events placed the "fish pond" within the regulatory scope of the 1899 Act (444 U.S. at 169-170 n.3), and this Court agreed that the "fish pond" fell "within the definition of 'navigable waters' " and thus was subject to regulation by the Corps (444 U.S. at 172-173, 179). *Kaiser Aetna* did not overrule the line of cases holding that the extension of navigability, by artificial means, even if made illegally without a federal permit, carries with it a corresponding extension of Corps regulatory jurisdiction under the 1899 Act.[9] An improvement that expands the reaches of navigability even carries "the risk that Congress might render it valueless by the exercise of paramount powers" manifested by the 1899 Act. *Sanitary District* v. *United States*, 266 U.S. 405, 431 (1925).

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[9]See *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407, 409 (1940); *Weiszmann* v. *District Engineer, United States Army Corps of Engineers*, 526 F. 2d 1302, 1305 (5th Cir. 1976); cf. *United States* v. *Stoeco Homes, Inc.*, 498 F. 2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975).

An entirely different question was decided in *Kaiser Aetna*, namely, whether connecting the fish pond with navigable waters of the United States required the owner to permit general public access. This Court held that the United States could not impose this kind of "navigational servitude" on the fish pond without impairing the owner's compensable property right to exclude others (444 U.S. at 179-180). Similarly, in *Vaughn*, this Court addressed, and remanded for further state court proceedings, the question whether one in possession of a privately owned and privately constructed canal, which was tidal, navigable, and connected to public waterways, could exclude commercial fishing boats from free navigational access to his canal. In *Vaughn*, neither the United States nor any federal agency was a party, and the coverage of Corps regulations under the 1899 Act was not addressed.

No Corps permit or directive has required petitioner to permit free public navigational access to the Cheniere Traverse Canal. Indeed, despite petitioner's efforts to inject this issue, the facts in the present record[10] simply do not raise the question. The proprietary "right to exclude" nongovernmental intruders from the canal was the principal question in both *Kaiser Aetna* and *Vaughn*. In this case, however, there is no canal proprietor before the Court. Petitioner has never clearly alleged that he holds any proprietary or possessory interest in the canal. Additionally, he is unable to identify any other private canal owner. The court of appeals noted that there is no evidence indicating that the canal was privately owned at all (Pet. App. A14 n.10). The only issue in this case is whether the placement of material in this tidal canal, either by its owner or others, requires some kind of

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[10]The petition assails no factual findings as clearly erroneous. Accordingly, petitioner is bound by them. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

Corps permit under the Rivers and Harbors Appropriation Act. *Kaiser Aetna* plainly confirms that it does.[11]

2. Other issues suggested in the record and by the petition are not now ripe for review. Petitioner seems to assert that the Corps' regulatory power over the dam and causeway site in the canal must give way to his supposed right to cross the canal for access to private lands, the ownership and possession of which are presently unclear.[12] Whether a future Corps permit can reconcile petitioner's access needs and the navigational needs of canal users cannot be determined until petitioner applies for a permit and the Corps acts upon his request. Finally, petitioner's pending $100,000 counterclaim for the depreciation of "his" property has not been acted upon in the district court. Not only does the claimed impairment of petitioner's asserted property interest remain an open question; so too does the manner or monetary amount by which such impairment will be compensated or otherwise adjusted. So long as such questions are unresolved, further review of this case in this Court is premature. *San Diego Gas & Electric Co.* v. *City of San Diego*, No. 79-678 (Mar. 24, 1981), slip op. 9-11.

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[11]Since petitioner has already conceded that the canal is subject to the Clean Water Act (*supra*, note 4), it also follows that a "dredge-and-fill" permit is required under Section 404 of that Act, 33 U.S.C. (Supp. III) 1344.

[12]As noted earlier (*supra*, note 2), the access right and the lands served by it are apparently owned by DeFelice Land Corporation, and not petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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